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caused by the defendant; he distinguishes this case from *Dulieu v. White* on the ground that the defendant was guilty of no wrong to the plaintiff, since there was no reason to anticipate at the time he was guilty of the negligence which caused the accident, that the accident would be of such a terrible nature that a mere bystander would be so shocked at seeing the accident as to suffer physical injury. Whereas in *Dulieu v. White* the conduct of the defendant threatened direct physical injury to the plaintiff and so was wrongful to him, apart from the mere possibility that he would be so seriously frightened as to be physically injured.

Spoken words can easily start a train of events which ends in physical injury and it is often easy, in cases like the one under discussion, to trace the physical injury by natural steps back to the words used. When one considers that England was at war at the time, it is not strange that the woman was greatly frightened; an ordinary person would be certain to suffer a shock from such an accusation, and that illness resulted is not at all surprising. Add to these factors the elements of malicious purpose and knowledge that such accusations were likely to cause physical injury, facts found by the jury, and the conclusion is evident: if the physical illness was the direct result of the nervous shock caused by the statements made to her by the defendant, the plaintiff had a right to recover. "The true question would seem to be whether the fear in which the plaintiff was put by the defendant's wrongful or negligent conduct was such as, in the circumstances, would naturally be suffered by a person of ordinary courage and temper, and such as might thereupon naturally and probably lead in the plaintiff's case to the physical effects complained of."¹⁴ All of these things were found in the case under discussion.

Cases, in which physical injury resulting from spoken words is made the cause of an action, are rare. When the words are not spoken directly to the plaintiff, an action based on illness or shock resulting therefrom may be denied without conflict with the principal case, on the ground that there is no misconduct towards the person injured.¹⁵ But when the words are spoken to the plaintiff wilfully and with an intention of causing fright, then there is no reason why the usual rules for tort liability should not be applied, and if a case is made out, the fact that spoken words were the origin of the injury should not affect the result. The rules are broad enough to include such a case and, in England at least, there is authority for such a decision.

E. L. P.

THE BURDEN OF PROOF WHERE THERE HAS BEEN LOSS BY BAILEE.—Agistment, both at common law and by statute, is universally treated and considered as one species of bailment, and

¹⁴ Pollock, *Torts*, 9th Ed., 53.

¹⁵ *Bucknam v. Great Northern Ry.*, 76 Minn. 373, 79 N. W. 98 (1899); *Gaskins v. Runkle*, 25 Ind. App. 584, 58 N. E. 740 (1900).

the liabilities of agisters do not in the main differ from those of other bailees for hire.¹ In the absence of a special contract an agister is not an insurer of the safety of the animals intrusted to him. He takes them on an implied contract that he will look after them with ordinary diligence and reasonable care, and therefore he is only bound to exercise that degree of care which a man of ordinary prudence would use under the same circumstances towards his own property.² One of the essential parts of every contract of bailment is the obligation to redeliver the property on demand at the termination of the bailment, and if the bailee fails to do so, he is liable unless he can show that his inability arises without fault on his part. The difficult question to determine, as in many other forms of bailment, is which party has the burden of proof. Where there is a special contract by which the agister undertakes to return the property, which amounts to a guaranty, he has the burden of accounting for the same.³ But with this exception, there is undoubtedly an elementary rule of law, that in all actions founded upon negligence, or a culpable breach of duty, the burden is on the plaintiff to establish negligence. There is, however, a decided conflict as to whether the loss, while in the bailee's possession, raises such a presumption of negligence on his part as to establish a *prima facie* case against him.

There is one line of decisions which holds the burden of proving negligence rests on the plaintiff throughout, and that when an agister is sued for a negligent loss, the mere proof of the loss does not make out a *prima facie* case, the plaintiff being required to show that it was the result of a failure on the part of the defendant to exercise the reasonable care and diligence imposed on him by the nature of his undertaking.⁴ On the other hand, the better and more modern rule modifies the preceding one in that the plaintiff establishes a *prima facie* case by showing that the property delivered to the agister was not delivered back to him on demand.⁵ This is on the theory that the bailee's failure to redeliver raises the presumption that the loss was due to his own negligence. The most troublesome question occurs at just this stage of the proceedings. Must the bailee overcome this *prima facie* presumption by showing that the loss or damage was consistent with the ab-

¹ *Cotton v. Arnold*, 11 Mo. App. 596, 95 S. W. 280 (1906); *Wilensky v. Martin*, 60 S. E. 1074 (Ga. 1908).

² *Smith v. Cook*, 1 Q. B. D. 79 (Eng. 1875); *Sargent v. Slack*, 47 Vt. 674 (1875); *Cloyd v. Steiger*, 139 Ill. 41, 28 N. E. 987 (1891); *O'Keefe v. Talbot*, 84 Iowa 233, 50 N. W. 978 (1892); *Arrington Bros. v. Fleming*, 117 Ga. 449, 43 S. E. 691 (1903); *Vaughn v. Bixby*, 24 Cal. App. 641, 142 Pac. 100 (1914).

³ *Ware Cattle Co. v. Anderson Co.*, 107 Iowa 231, 77 N. W. 1026 (1899).

⁴ *Broadwater v. Blot*, 3 E. C. L. 216 (Eng. 1817); *McCarthy v. Wolfe*, 40 Mo. 520 (1867); *Kemp v. Phillips*, 55 Vt. 69 (1883); *Wood v. Remick*, 143 Mass. 453, 9 N. E. 831 (1887).

⁵ *Cummings v. Mastin*, 43 Mo. App. 558 (1891); *Pearce v. Sheppard*, 24 Ont. 167 (1893); *Shropshire v. Sidebottom*, 30 Mont. 406, 76 Pac. 941 (1904); *Mattern v. McCarthy*, 73 Neb. 228, 102 N. W. 468 (1905).

sence of fault on his part, or in other words, that he had exercised such care as was required by the nature of the bailment? Or does he shift back to the plaintiff the burden of proceeding further, by simply stating how the loss occurred, leaving it to the plaintiff to prove the negligence? The recent English case of *Coldman v. Hill*⁶ not only seems to support the first proposition, but to extend its application. The facts involved were that a farmer accepted certain cattle for agistment, which later were stolen without any default or negligence on his part. However, after learning of the theft, he neither notified the owner, nor did he make any attempt to recover them by search or notification to the police. The Court of Kings Bench reversed the decision of the lower court, which had held that the burden of proof was upon the plaintiff, to show that the defendant's omission to act subsequent to the disappearance of the cattle was negligence which caused the loss of the cattle. There was evidence that even had the defendant taken these steps, the cows would not have been recovered. The case thus stands for the following propositions: (a) that when there is a loss of agisted cattle, the onus is on the agister to prove that it was not due to his negligence. And although he may clearly show that the cattle got out of custody and control without any fault on his part, yet when there is only a temporary loss and he has taken no steps towards recovery, he must (b) also show that had he taken such steps he would not have recovered the cattle and prevented the final loss.

The American cases, broadly speaking, are not in accord with the above case, nor would the principles therein laid down admit of such an interpretation. In the case of *Casey v. Donovan*,⁷ the Court held, that although the bailor made out a prima facie case, by showing that the property delivered to the bailee was not returned to him on demand, and that this prima facie presumption of negligence satisfied the burden of proof which rested with the bailor, nevertheless the burden of proof of the bailee's negligence always remained with the bailor. And in *Calland v. Nichols*,⁸ where a number of cattle died while in the bailee's charge, the mere statement of that fact was held as a sufficient accounting on the bailee's part, and the burden of proof of negligence was upon the bailor. In many other cases the law is laid down, that an agister is only bound to exercise care in preserving and protecting the property while in his custody, and he may relieve himself from liability in case of a loss by showing that the property was not lost by reason of his negligence.⁹ In no case has the difference

⁶ 1 K. B. 443 (Eng. 1919).

⁷ 65 Mo. App. 521 (1896).

⁸ 30 Neb. 532, 46 S. W. 631 (1890).

⁹ Union Stock Yard Co. v. Mallory Co., 157 Ill. 554, 41 N. E. 888 (1895); Rayl v. Kreilich, 74 Mo. App. 246 (1898); Parlato v. Thomas, 123 N. Y. S. 373 (1910); Grout v. Meyer, 91 Neb. 845, 137 N. W. 844 (1912).

been drawn between a temporary and a complete loss, so as to snift the burden of proof in one case and not in the other. It seems that although the burden of proceeding with the evidence may shift, yet if the liability of an agister is founded upon negligence, as treated by the American cases, the burden of proving negligence should be upon the plaintiff, and remain upon him throughout the trial. And it certainly is the universal rule, that when the plaintiff alleges specific negligence in caring for his animals, he must prove the allegation.¹⁰ A few jurisdictions require that the bailee show that he has exercised such care as is reasonably required by the nature of the bailment. In such states the plaintiff need not allege negligence on the bailee's part, its absence being a matter of defense, and to exonerate himself the defendant must show due care. The reason being, that when property is not returned by the bailee, it would be a very difficult thing for the bailor to show in what way the loss occurred, or that it had actually occurred by the negligence of the bailee, or his employees. The bailor not being so likely to know what caused the injury or loss as would the bailee in whose possession the bailed property was.¹¹ However, there is undoubted authority¹² that an agister must notify the bailor of any unusual risk to which his cattle are exposed, or of any change in conditions by which his property might be harmed. On this ground there may be some reason for the court's decision in the principal case.

J. H. C.

¹⁰ *Crawford v. Cashman*, 82 Mo. App. 554 (1900); *Shropshire v. Sidebottom*, *supra*.

¹¹ *Hudson v. Bradford*, 91 Ill. App. 218 (1900); *Bagley v. Black*, 154 S. W. 247 (Tex. 1913); *Nutt v. Davison*, 54 Col. 586, 131 Pac. 390 (1913).

¹² *McLain v. Lloyd*, 5 Phila. 195 (1863); *Kemp v. Phillips*, *supra*; *Nutt v. Davison*, *supra*.